February 13, 2003

VIA ELECTRONIC FILING

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Review of the Section 251 Obligations of Incumbent Local Exchange Carriers,* CC Docket Nos. 01-338, 96-98, 98-147 *Ex Parte Communication*

Dear Ms. Dortch:

On February 7, 2003, Cbeyond Communications, NuVox, Inc., SNiP LiNK, LLC, and SBC Telecommunications, Inc. ("the Parties") filed a joint proposal in the above-referenced matter regarding a compromise approach on the issue of whether, and how, to modify the safe-harbor mechanisms for enhanced extended links ("EELs") established by the Commission in its *Supplemental Order Clarification.*[1] The proposal presents a comprehensive and legally sustainable solution to the impasse between ILECs and CLECs on EELs use restrictions that has been festering now for years in proceedings before this Commission and in the states.

The issue of EELs use restrictions was extensively debated in the UNE Remand proceeding and in several proceedings since, including the Further Notice stemming from the UNE Remand, various waiver applications, the NuVox Petition for Declaratory Ruling and in complaint proceedings filed by BellSouth against various CLECs, including NuVox. In this proceeding, the issue has been hotly contested from the opening round of comments and replies and in a long series of *ex partes* that have now come regularly for months. That Verizon chose to focus more intently on other issues until the final weeks of this proceeding was its own decision. Nevertheless, Verizon, BellSouth and Qwest certainly have had their say – as have those carriers that use and depend heavily on EELs, NuVox, SNiP LiNK and Cbeyond, included.

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[1] CC Docket No. 01-338, *Ex Parte* Letter from Cbeyond Communications, NuVox, Inc., SNiP LiNK, LLC and SBC Telecommunications, Inc. to Secretary, Federal Communications Commission (Feb. 7, 2003) ("EEL *Ex Parte*").

Despite all of this, Verizon continues to plead with the Commission to maintain the "status quo" because the impact of any change to the current Safe Harbors is not fully known. *Verizon,* Feb 12 *Ex Parte Ex Parte* at 4.[2] However, the future impact of any rule change can never be fully known. Indeed, it is now certain that the impact of the current Safe Harbors was not fully known, nor could it have been. Nevertheless, it is quite apparent that if the Commission were to adopt the joint SBC/NuVox/Cbeyond/SNiP LiNK EELs proposal, it would effectively address the Commission's concerns regarding impairment with respect to EELs and its goal or ensuring that IXCs cannot use EELs exclusively for interexchange service, that ILECs cannot use the restrictions to prevent legitimate use of EELs, and that smaller CLECs such as NuVox, SNiP LiNK and Cbeyond would be able to access EELs under a streamlined test that imposes burdens proportionate to the risks they present with respect to compliance with a "significant local use" standard. If Verizon's argument was valid, this Commission would never change its UNE rules and one result would be far greater access to UNEs than is currently anticipated to be the result of this Triennial Review proceeding. Another result would be endless litigation stemming from large ILEC gaming and abuse of the existing Safe Harbors. Notably, smaller CLECs such as NuVox have been the target of such litigation and large ILECs such as BellSouth have threatened more of the same.[3]

Also notable is the fact that the "status quo" is very much what Verizon and BellSouth make it to be. Although the current Safe Harbors apply only to conversions, Verizon, BellSouth and others have unlawfully sought to extend their application to new EELs. Even though BellSouth has for years provided access to new EELs without requiring precertification or compliance with the Safe Harbors, it now has begun asking certain carriers for such certification and has held new orders hostage to meeting that unlawful demand. BellSouth also brazenly exports the "co-mingling" restriction outside this context and applies it to stand-alone UNEs, so that it can isolate UNEs and make them as useless as possible. Although it is clearly a violation of the Commission's rules for ILECs to independently impose such use restrictions on UNEs, CLECs have had little alternative to protest and work through this and related proceedings in search of resolution. Further, the record is rife with evidence that BellSouth (again) has, through attempted expansion and thinly veiled harassment, abused the limited audit rights it received in the *Supplemental Order Clarification.* Although, Verizon has stated that it is not guilty of such audit abuses, it offers no guaranty that it will not engage in such tactics as a means of discouraging future EELs use and driving up its competitors costs or otherwise driving them into submission. Make no mistake about it, BellSouth and Verizon have the resources to litigate smaller CLECs out of existence.

Indeed, the record in this proceeding amply demonstrates that the existing Safe Harbors have had chilling effect on smaller CLECs' ability to use EELs. Some CLECs have never even managed to convert circuits to EELs because ILECs have been unwilling to incorporate the Safe Harbors into interconnection agreements without attempting to impose other burdens on requesting carriers. Verizon suggests that these burdens have not been set forth, but we disagree.

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[2] In nearly the same breath, Verizon also asserts that the proposal would cost it "hundreds of millions of dollars". Of course, this assertion is entirely unsubstantiated. Nevertheless, it does suggest that CLECs (and, indirectly, consumers) are simply paying Verizon too much for network elements.

[3] BellSouth also has unlawfully sought to audit Cbeyond's use of EEL circuits.

Throughout their filings on this issue smaller CLECs such as NuVox, SNiP LiNK and Cbeyond have demonstrated the burdens that the current regime places on them. NuVox alone has spent tens of thousands of dollars in refusing to submit to BellSouth's unlawful audit requests – and a final decision on the matter has yet to be reached. Notably, the proposal set forth by SBC, NuVox, Cbeyond and SNiP LiNK, provides for access to EELs subject to bright-line criteria in an audit free environment. If disputes do evolve, there should be far fewer of them and circuits would be provisioned as EELs subject to true-up and complaint resolution by the Commission.

To be sure, for most smaller CLECs, the costs and burdens associated with the "safe harbors" established in the Clarification are especially high, particularly given the particularly low risk of non-compliance with the significant local use standard they pose. In particular, usage-based EEL qualification criteria (such as options 2 and 3 under the current safe harbors) pose special and unique burdens for these CLECs, as the measurement requirements contained therein require additional circuit specific engineering and monitoring which may also entail the deployment of additional equipment, systems and processes and dedication of scarce capital and manpower resources to capture data and conduct studies necessary ensure reasonable compliance with the measurement criteria.[4] The costs and burdens associated with audits also are disproportionately high, given that smaller CLECs have far fewer manpower and technical resources and less financial ability to engage external resources that may be necessary to establish compliance and defend audits against the comparatively greater resources of the ILECs. In short, smaller CLECs such as NuVox, SNiP LiNK and Cbeyond do not have the engineers and technicians, or the systems and procedures, or the financial and legal resources, necessary to make wide scale use of EELs under the current Safe Harbors.[5]

Verizon also takes issue with one issue that is part of the streamlined test for smaller carriers and one that its not. First, it is plain from the joint filing that the streamlined test for smaller carriers includes no co-mingling restriction. NuVox, SNiP LiNK and Cbeyond have consistently opposed co-mingling restrictions and do not believe that smaller carriers should have to bear the burdens posed by that restriction, especially in light of the relatively small risk they present.

Second, Verizon focuses on the ratio of interconnection trunks to EELs included in the test and makes the representation that it amounts to a "maximum of 4% local usage" rule on an EEL-by-EEL basis. However, the Parties to the proposal intended to design a test that would accommodate the possibility that EELs could be used for a variety of purposes provided that overall the CLEC was a provider of local service and exchanged local traffic with the ILEC. The EEL/interconnection trunk ratio was specifically designed to avoid the onerous and unrealistic measurement of traffic on each EEL that is reflected in Verizon's argument and to use instead an architectural approach to assuring compliance with the "significantly local" requirement. The Commission should embrace the proposed approach to access to EELs, rather

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[4] *See, e.g.,* NuVox/SNiP LiNK, Reply Comments at 51, NuVox/SNiP LiNK 1/1/03 *Ex Parte,* Cbeyond *12/16/02 Ex Parte* at 2-3.

[5] Because "new EELs" have been available in so many states (for years) without restriction, smaller carriers generally have not had to develop and maintain these capabilities, to date.

than give any consideration to Verizon's attempt to premise access to EELs on measurement of traffic.

Verizon's representation is wrong for a number of other reasons. Most importantly, Verizon is wrong because it operates from the mistaken premise that "each and every EEL" must carry what Verizon considers to be "local" traffic. That presumption does not underlie the existing Safe Harbors that were upheld by the DC Circuit, nor should it be part of any streamlined test applicable to smaller carriers. For example, under Safe Harbor Option One, the Commission explicitly and emphatically states that a CLEC can use the converted EEL circuit to "carry any type of traffic, including using them to carry 100% interstate access traffic." Moreover, note 64 of the *Supplemental Order Clarification* makes clear that the Commission adopted an expansive notion of what constitutes "local" for the purposes of the "significant local use" test. Notably, ISP-bound traffic is considered local if it is treated as such in a carrier's state-approved tariffs or if it is subject to reciprocal compensation arrangements between a requesting carrier and an incumbent LEC.

Verizon's erroneous 4% assertion also does not take into account that not all traffic carried over EELs will be exchanged with Verizon. Although it still has a stranglehold on the lion's share of the market, CLEC customers do call other CLEC customers and place other local calls that never reach Verizon's network. Thus, not all local traffic flows over interconnection trunks between the requesting CLEC and the providing ILEC. Moreover, no CLEC has a base of circuits that is 100% EELs, nor is it apparent that any CLEC currently has in place the maximum number of EELs it could have under the interconnection trunk to EEL ratio established in the streamlined test.[6] Indeed, with 45% of its end user circuits being EELs, NuVox may be the CLEC that uses EELs the most in proportion to its total end user circuits. Cbeyond has a similar percentage of circuits in its network that are EELs.[7]

The ratio contained in the streamlined test is simply a well designed proxy to determine whether a CLEC uses EELs to support the exchange of a significant amount of local traffic on a LATA-wide basis with the ILEC.[8] It does not contain, constitute or reflect a specific percentage of local traffic per circuit or number of local lines *per circuit* requirement. The ratio has its roots in the general engineering principle that for every 5 local access lines, a CLEC needs 1 DS0 interconnection trunk. Thus, on average, a CLEC will need 1 interconnection trunk for every DS1 EEL, if those circuits provide an average of 5 access lines. The ratio works out that a company that relies exclusively on EELs must have a 5 access line per EEL average across the LATA (assuming that those lines drive the need for a corresponding DS0 interconnection trunk). Since smaller CLECs use DS1 loops (which also drive the need for interconnection trunks) in addition to DS1 EELs (or their equivalent) and may not use all the EELs they could qualify for under the test, the average number of lines per circuit needed to satisfy the proxy is actually much lower. In sum, the proxy has been designed to be both relevant and flexible as it will give

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[6] Notably, the streamlined test does not establish a "maximum" amount of local traffic proxy as Verizon suggests. The test establishes a minimum amount of local traffic proxy and it does so on a LATA-wide basis.

[7] Both NuVox and Cbeyond have extensively collocated in their markets.

[8] The test does not contemplate nor require segregating local interconnection trunks between UNE loop and EEL traffic. Local traffic, whether from loops or EELs, will be exchanged over the same interconnection trunks.

CLECs and their customers freedom to use EELs as they wish (including integrated T1 products and all data products), provided that CLEC exchanges a significant amount of local traffic with the ILEC LATA wide.

We also take this opportunity to point out that there is a sound legal and policy basis to the proposed definition of smaller carriers. In the compromise approach, the Parties proposed that smaller CLECs would be subject to a streamlined test for obtaining access to EELs. Under the proposal, smaller CLECs would be defined as a carrier (a) whose gross annual telecommunications revenues of itself and its affiliates may not exceed two percent of total telecommunications industry local and toll service revenues, as set forth in the most recently published version of *Trends in Telephone Service*; and (b) whose gross annual toll service revenues of itself and its affiliates my not exceed two percent of all toll service revenues, as set forth in the same report. The two percent figure is based on Section 251(f)(2) of the Act which provides for suspension and modification of Section 251(b) and (c) obligations for LECs with fewer than 2 percent of the nations subscriber lines installed in the aggregate nationwide.[9] Thus, there is a statutory basis for using two percent applied to an appropriate characteristic of the telephone industry for defining small carriers. However, the Parties proposed revenues, rather than lines, because of the simpler administration of a revenue test. Thus, there are inherent difficulties in measuring lines, in that carriers measure lines differently. Line measurement is likely to become more complex in an environment of increasingly packetized communications. At the same time, nationwide revenue figures are published regularly by the Commission and provide a ready basis for determining a revenue cap. In addition, the actual level of caps achieved under the compromise approach are well suited to identifying carriers to whom it is appropriate to apply the streamlined test in that these caps would exclude the largest CLECs and IXCs who have the most potential to transfer access traffic to EELs. Accordingly, there is a sound legal and policy basis for the proposed definition of smaller CLECs.

[9] 47 U.S.C. 251(f)(2).

In accordance with the Commission's rules, this written *ex parte* submission is being filed electronically with the Commission secretary for inclusion in the record of the above-captioned proceeding. Please do not hesitate to contact us if you have any questions pertaining to this letter or the EEL proposal in general.

Respectfully submitted,

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